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Nos. 97-296, 97-454 and 97-464

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL ARGUMENT

The United States, No. 97-454, seeks review of the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572 (6th Cir. 1997) (en banc). The Michigan Department of Environmental Quality ("MDEQ"), No. 97-296, seeks review of only the portion of that decision affecting respondent CPC International, Inc. ("CPC"). CPC opposes the petitions but has also filed a conditional cross-petition, No. 97-464, regarding the decision in favor of respondent Aerojet-General Corp. ("Aerojet"). Aerojet has filed a Brief in Opposition to the petitions.

Aerojet submits this Supplemental Brief under Rule 15.8 to address two matters arising after the filing of its Brief in Opposition. The first new matter is the *en banc* decision of the Sixth Circuit in *Donahey v. Bogle*, ___ F.3d ___, 1997 U.S. App. LEXIS 32146 (6th Cir. Nov. 17, 1997). The second is the United States' request that the MDEQ's petition in No. 97-296 and CPC's conditional cross-petition in No. 97-464 be held in abeyance pending the Court's disposition of the United States' petition in No. 97-454.

1. On November 17, 1997, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, issued its opinion in the case of *Donahey v. Bogle, supra*. In *Donahey*, the Sixth Circuit again recognized the potential for both direct and derivative theories of operator liability under § 107(a)(2) of CERCLA. *Donahey* involved, among other things, the issue of the operator liability of a 100% stockholder of a polluting company. The Sixth Circuit found the veil-piercing analysis of *Cordova* equally applicable to *Donahey* and held that the 100% stockholder was on the facts of the case not liable as an operator for the cleanup of the property at issue. *Donahey*, 1997 U.S. App. LEXIS 32146, *15-

16. The Sixth Circuit in *Donahey* also noted that *Cordova* provided for § 107(a)(2) operator liability for parent corporations that "directly operate" a facility, but concluded that a scenario supporting such direct liability was not before the court in *Donahey*. *Id.* at *16 n.7. Thus, the Sixth Circuit has once again recognized both direct and derivative theories of operator lability, contrary to the claim of the United States. The only remaining issue is whether the Sixth Circuit properly applied the theories to the facts of both cases. This Court should not spend its time policing particular applications of settled legal theories.

2. The United States requests that the MDEQ's petition, No. 97-296, and CPC's conditional cross-petition, No. 97-464, be held in abeyance pending the Court's disposition of the United States' petition, No. 97-454, but the reason the United States gives for its request actually supports denial of all these petitions without delay. According to the United States, the MDEQ has a unique interest in the outcome of the case because the Michigan Court of Appeals has held that the MDEQ must reimburse Aerojet and its subsidiaries for any CERCLA liability they may incur at the site. As set forth in Aerojet's Brief in Opposition, *see* Aerojet Br. Opp. at 12, 16-17, the MDEQ's reimbursement obligation actually supports prompt denial of all petitions with regard to Aerojet, because taxpayers will bear the ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries — precisely the result the United States asserts that it seeks to avoid in filing its petition. Moreover, denial of the petitions with regard to Aerojet will still allow both the state and federal governments to obtain complete relief from CPC if they prevail on the merits. Accordingly, while Aerojet agrees that the MDEQ has a unique interest in the outcome of this case, such

interest does not justify holding some of the petitions in abeyance and further prolonging this already protracted litigation.[1]

The United States' submission also discloses another basis to deny the petitions on claims against Aerojet without delay. The United States notes that settlement discussions with the MDEQ and Aerojet could ultimately lead to an agreement that would moot the claims against Aerojet and bar any future contribution actions under § 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).[2] This

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[1] Even though none of the governmental parties could possibly be prejudiced by prompt denial of the United States' petition and CPC's conditional cross-petition on the claims against Aerojet, CPC argues that its potential contribution claim against Aerojet may be compromised. But CPC's argument ultimately dissolves into nothing more than a desperate plea to this Court to save CPC from the natural consequences of its own voluntary decision to abandon contribution claims in this litigation. In its Reply Brief, CPC attempts to dodge this problem by blatantly mischaracterizing Aerojet's position with a selective quotation from Aerojet's Brief in Opposition. Contrary to CPC's characterization, Aerojet has never claimed that CPC abandoned its contribution claims for all time, and has never challenged CPC's statement that contribution claims have been reasserted in a *new* lawsuit still pending in district court (No. 1:94-CV-432 (W.D. Mich.)). Aerojet has stated only that CPC abandoned its contribution claim *in this litigation*, which is indisputably true. Whether CPC has reasserted a contribution claim in new litigation involving a different matrix of parties and claims has no bearing on whether this Court should choose to review issues *in this litigation* that have no practical impact on claims remaining *in this litigation*.

[2] Even if no new settlement is reached, the 1977 Stipulation and Consent Order with the State of Michigan was itself a resolution of liability to the State within the meaning of § 113(f)(2) that should bar both the State's claim against Aerojet and the contribution claim asserted by CPC. The district court rejected this contention. The parties briefed

Court should not devote its resources to a matter that the petitioning party acknowledges may settle before hearing.

CONCLUSION

The Petition for a Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[3]

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Respectfully submitted,

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the issue on appeal, but the Sixth Circuit did not address it. CPC's potential contribution claim, which is no longer a part of this litigation and which is not viable in any event under § 113(f)(2), does not provide a sufficient justification for granting certiorari on the claims against Aerojet.

[3] No relief is sought against Aerojet or its subsidiaries in the Petition of the MDEQ (No. 97-296).

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